IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12450 of 2005

For Approval and Signature:

HON'BLE MR JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT ELECTRICITY BOARD - Petitioner(s)
Versus
MULTIPLEX TRADING AND INDUSTRIAL COMPANY LTD. - Respondent(s)

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Appearance :
Mr. Kamal B. Trivedi, Senior Advocate with MS LILU K BHAYA for the Petitioner.
Mr. S.B.Vakil, Senior Advocate with MR BD KARIA for the Respondent.

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CORAM : HON'BLE MR JUSTICE DN PATEL

Date : 03/08/2005

ORAL JUDGMENT

By the consent of the learned counsels for both the sides, this special civil application is taken up for its final hearing. This petition has been preferred under Article 226 of the Constitution of India against the order dated 28th April, 2005 in Arbitration petition No. 26 of 2004 passed by the learned Designate of the Chief Justice under The Arbitration and Conciliation Act, 1996. (hereinafter referred to as "The Act of 1996"). By the impugned order, the learned Designate of the Chief Justice has appointed Shri S.D.Dave, Retired Judge of this Court as an Arbitrator.

2. Learned Senior Advocate Mr. Kamal B. Trivedi appearing for the petitioner mainly submitted that the order passed by the learned Designate of the Chief Justice suffers from several infirmities and they are as under:

> *"(1) Section 11 of the Act of 1996 has not been properly appreciated, inasmuch as the fact that there is already an agreement between the parties. Clause 7 thereof is explicitly clear.*

Clause 7 of the agreement points out the name of the arbitrator and the learned Designate of the Chief Justice ought to have appointed the arbitrator who is pointed out in clause-7 of the agreement.

(2) The learned Senior Advocate Mr. Trivedi has also pointed out that as per section 11(1) of the Act of 1996, when there is an agreement in existence, the learned Designate of the Chief Justice has no power, jurisdiction and authority to appoint another arbitrator, than who is referred in Clause 7 of the agreement. The sanctity of the agreement ought to be maintained by the learned Designate. The only exception to section 11 of the Act of 1996 is an agreement in existence. Once the agreement is in existence and there is a name of arbitrator therein, the learned Designate of the Chief Justice ought not to have appointed another arbitrator. This tantamounts to novatio of the agreement which is not permissible.

(3) The learned advocate for the petitioner has also submitted that as the learned Designate of the Chief Justice has not appreciated the fact that as a new Chairman of GEB has taken a charge, the contention of "bias" against the Chairman does not survive. Once the existence, validity and interpretation of clause-7 of the agreement is not in dispute, coupled with the fact that the Chairman of GEB has already been changed and another officer has taken over the charge, there was no reason for the learned Designate of the Chief Justice to appoint another arbitrator than who is named in clause-7 of the agreement."

3. In support of his arguments, the learned Senior Advocate for the petitioner has also relied upon

following authorities:-

(1) Michael Golodetz vs. Serajuddin and Co. reported in AIR 1963, SC 1044 (V 50C 155).

(2) The Secretary to the Government Transport Department, Madras vs. Munuswamy Mudaliar reported in AIR 1988 SC 2232.

(3) G. Ramchandra Reddy and Co. vs. Chief Engineer, Madras, MES reported in AIR1994 SC 2381.

(4) State of Orissa vs. Narain Prasad reported in (1996) 5 SCC 740.

(5) M/s. Indian Drugs and Pharmaceuticals Ltd. vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. Reported in AIR 1996 SC 543.

(6) Datar Switchgears Ltd. vs. Tata Finance Ltd. Reported in (2000) 8 SCC 151.

(7) Bihar State Mineral Development Corporation Ltd. vs. Encon Builders (I) Pvt. Ltd. Reported in AIR 2003 SC 3688.

(8) Union of India vs. Mohan Lal Puglia reported in (2004) 1 SCC 768.

(9) Mallikarjun vs. Gulbarga University reported in (2004) 1 SCC 372.

(10) Dharma Prathishthanam vs. Madhok Construction Pvt. Ltd. Reported in 2005 SC 214.

(11) Dewan Chand vs. State of J and K reported n AIR 1961 Jammu and Kashmir 58 (v 48 C 24).

(12) D.K.Gupta vs. Indian Oil Corporation Ltd. Reported in 2003 (1) Arbitration Law Reported 450(Orissa).

From the aforesaid authorities, it is contended by the learned Senior Advocate for the petitioner that the petition is maintainable under Article 226

of the Constitution of India against the order passed by the learned Designate of Chief Justice. This Court has plenary power. Alternative remedy is no ground for rejection of the writ petition and section 5 of the Act of 1996 can never restrict the power of this Court under Article 226 of the Constitution of India.

4. It is also submitted by the learned counsel for the petitioner that necessary procedure for preferring an application under section 11 of the Act of 1996 has not been followed or complied with. There is no notice given by the respondent to the petitioner for appointment of an arbitrator as envisaged by clause-7 of the agreement and, therefore, there is no question of lapse of 30 days from the date of receipt of notice whatsoever arises. This aspect of the matter has not been appreciated by the learned Designate of the Chief Justice.

5. The learned Senior Advocate for the petitioner has also compared the provisions of The Arbitration Act, 1940 and The Arbitration and Conciliation Act, 1996,

more particularly sections 11 and 16 of the new Act and has submitted that there are several judgments which are referred to hereinabove, which compels the Court to appoint named arbitrator referred to in the agreement. Once the agreement is in existence and there is a reference of arbitrator, the court should not re-write contract and appoint another arbitrator. All these aforesaid aspects of the matter have not been taken into consideration by the learned Designate of the Chief Justice and hence the impugned order dated 28th April, 2005 in Arbitration petition no. 26 of 2004 passed by the learned Designate of the Chief Justice deserves to be quashed and set aside.

6. The learned Senior Advocate Mr. S.B.Vakil appearing for the respondent has mainly contended that:

(i) The present petition is not maintainable under Article 226 of the Constitution, mainly for the reason that whatever contentions have been raised by the petitioner in the writ petition under Article 226 of the Constitution, can also be raised under section 16 of the Act

of 1996.

(ii) The learned Senior Advocate for the respondent has also submitted that as per section 5 of the Act of 1996, it is a legislative policy that the Court should not interfere once arbitrator is appointed under the Act of 1996. To minimise the intervention of the Court, section 5 has been enacted. The learned Senior Advocate for the respondent has also quoted the anology of election matters with arbitration proceedings, especially with the fact that once an arbitrator is appointed under section 11 of the Act of 1996, the Court should not, generally interfere with the arbitration proceedings.

(iii) The learned Senior Advocate for the respondent has also relied upon the following judgments:-

(1) Konkan Railway Corporation Ltd. vs. Rani Construction, (2002) 2 SCC 388, page 405 para 21.

(2) Gird Corporation of Orissa Ltd. Vs AES Corporation and others (2002) 7 SCC 736 para 25.

(3) State of Orissa vs. Gokulnanda Jena (2003) 6 SCC 465 para 8 page 468.

(4) Food Corporation of India vs. Indian Council of Arbitration (2003) 6 SCC 564. Paras 12,13,14 and 15 at page 468.

(5) Hythro Power Corporation Ltd. vs. Delhi Transco Ltd. (2003) 8 SCC 35 para 11 at page 39.

(6) Van Oord Acz India Pvt. Ltd. vs. Gujarat Adani Port Pvt. Ltd. XLVI (1) GLR 446.

(7) New India Assurance Co. Ltd. vs. Hanjer Fiber Ltd. AIR 2003 Gujarat 311 (FB).

7. It has been pointed out from the aforesaid judicial pronouncements that the writ petition preferred by the petitioner is not tenable at law, for the reason that whatever grounds are available under section 16 of the Act of 1996 ought not to have been allowed to be raised in the petition under Article 226 of the Constitution of India. The golden thread running throughout the aforesaid judgments, is, not to interfere in the arbitration proceedings. The parties should be allowed to raise all the possible contentions before the arbitrator who is already appointed.

8. The learned Senior Advocate for the respondent has also submitted that the ground of bias against the named arbitrator in clause-7 of the agreement is not

raised for the first time in the arbitration petition before the learned Designate of the Chief Justice, nor was it taken for the first time in the reply in the writ petition before this Court, but it was taken at the very initial stage, that is, in the notice given by the respondent dated 11th May, 2004 (Annexure “B' collectively to the memo of the petition). The reply of the petitioner that there is a change in the chairperson of the GEB and therefore, “bias” will not be there in the newly appointed officer, but this is a **contentious issue.** It ought to be resolved by the arbitrator and not by this Court.

9. It is also contended by the learned Senior Advocate for the respondent that clause-7 of the agreement is not prescribing any procedure for appointment of the arbitrator, but it gives only the name of the arbitrator. Hence, whenever there is a failure by the petitioner to appoint an arbitrator within 30 days from the date of receipt of the notice, it is always open for the respondent to prefer an application under section 11 of the Act before the Court and it is within the powers of the

learned Designate of the Chief Justice to appoint an arbitrator and hence, it cannot be said that there is want of jurisdiction or lack of power and authority on the part of the learned Designate of the Chief Justice. A notice was given by the respondent to the petitioner on 11th May, 2004 for appointment of an arbitrator or arbitrators. The reply given by the petitioner is after lapse of 30 days and that too, it was an interim reply. The said interim reply was dated 14th June, 2004. Nothing was made sure, in the reply except the fact that the revision in the work order, requires the approval of the board and hence whatsoever is stated in the notice, shall be brought to the notice of the Board. No appointment of the arbitrator was made by the petitioner even after application dated 31.8.2005 under section 11 of the Act of 1996 is preferred by the respondent. Therefore, this tantamounts to waiver of the right by the petitioner and therefore, the learned Designate of the Chief Justice has all power, jurisdiction and authority to appoint an arbitrator.

10. The learned Senior Advocate for the respondent

has also submitted that as per section 12(4) of the Act of 1996, if chairperson of GEB is appointed as an arbitrator, the respondent loses its right of challenge as to his “independence or impartiality”, whereas, the petitioner is not losing any right to argue before the arbitrator appointed by the learned Designate of the Chief Justice, the grounds which are referred to in the memo of this petition.

11. The learned Senior Advocate for the respondent has also submitted that contentious issues like bias, forfeiture of the right of the respondent under section 12(4) of the Act etc. cannot be decided by this Court in exercise of extraordinary jurisdiction under Article 226 of the Constitution. There is also a dispute as to waiver of the right of the petitioner by their conduct of non-appointment of arbitrator within 30 days from the date of receipt of notice. All these issues are highly contentious issues. It is also not in dispute whether Chairman of Gujarat State Electricity Corporation Ltd. (GSECL) is also the Chairman of GEB. Various laws and sections are required to be interpreted. The learned Senior

Advocate for the respondent has also pointed out that in certain meetings between the petitioner and respondent, during the course of settlement of the disputes, the Chairman has participated and therefore, it creates bias in the mind of Chairman and therefore, such persons ought not to be appointed as arbitrator. There may be a change in the chairperson, but the resolutions passed by the Board are binding to the chairperson. Such binding effect, whether is there with the chairperson or not is also a matter of great dispute. The effect of the resolutions of the Board will always be there in the mind of chairperson. It is difficult to be removed. The effects of resolutions of the Board, are not clothes or umbrellas which can be changed so frequently. Whether new chairperson will act independently or not is a matter of facts and requires to be proved and therefore, the order passed by the learned Designate of the Chief Justice of appointment of Shri S.D.Dave, Retired Judge of this Court, as an arbitrator is true, legal, correct and in consonance with facts and law, therefore, may not be interfered with by this Court, especially when

very limited is the scope under Article 226 of the Constitution of India, in view of section 5 of the Act of 1996, coupled with judicial pronouncements as stated hereinabove.

12. Having heard the learned counsel for both the parties at length and looking to the facts and circumstances of the case and judicial pronouncements which are referred, hereinafter, I see no reason to interfere with the order dated 28th April, 2005 in Arbitration petition no. 26 of 2004 passed by the learned Designate of the Chief Justice, mainly for the following facts and reasons:-

(i) There are several contentious issues like bias of the Chairman, GEB, as well as the waiver of right of appointment of arbitrator, if arbitrator is not appointed within 30 days of the date of receipt of notice. These contentious issues cannot be decided by this Court while exercising, powers conferred under Article 226 of the Constitution of India. The petitioner is at liberty to raise all the contentions before the arbitrator appointed by the learned

Designate of the Chief Justice vide impugned administrative order.

(ii) Section 12 of the Act, 1996 upon which the argument is based reads as under:

> *"12. Grounds for challenge:*
> *(1) xxx xxxx*
> *(2) xxx xxxx*
> *(3) An arbitrator may be challenged only if-*
> *(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or*
> *(b) he does not possess the qualifications agreed to by the parties.*
> *(4) A party may challenge an arbitrator appointed by him or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."*

As per section 12(4) of the Act of 1996, if the Chairman of GEB is appointed as an arbitrator, the respondent may lose its right to raise an objection as to "his independence or impartiality", whereas before the arbitrator appointed by the learned Designate of the Chief Justice, the petitioner can raise all the contentions as to appointment of arbitrator, qualifications of the arbitrator,

jurisdiction of the arbitrator and the like.

(iii) The grounds which are available under section 16 of the Act of 1996, ought to be avoided to be adjudicated upon, in exercise of the extraordinary jurisdiction under Article 226 of the Constitution of India. It has been decided by the Hon'ble Supreme Court the case of **State of Orissa and others vs. Gokulnanda Jena** reported in **(2003) 6 SCC, 465,** especially in paras 8, 9, 10 and 11 as under:

> *"8. However, we must notice that in view of section 16 read with sections 12 and 13 of the Act, as interpreted by the Constitution Bench of this Court in Konkan Railway, almost all disputes which could be presently contemplated can be raised and agitated before the Arbitrator appointed by the Designate Judge under section 11(6) of the Act. From the perusal of the said provision of the Act, it is clear that there is hardly an area of dispute which cannot be decided by the arbitrator appointed by the Designated Judge If that being since an alternative efficacious remedy is available before the arbitrator, writ court normally would not entertain a challenge to an order of the Designated Judge made under section 11(6) of the Act which includes considering the question of jurisdiction of the arbitrator himself. Therefore in our view, even though a writ petition under Article 226 of the Constitution is available to an aggrieved party, ground available for challenge in such a petition is limited because of the*

alternative remedy available under the Act itself.

9. Having come to the conclusion that a writ petition under Article 226 is maintainable as against the order made by the Designated Judge under section 11(6) of the Act on limited grounds, we will now consider whether such grounds are available to the petitioner to challenge the order of the Designated Court in the case in hand. For this purpose, we have noticed that grounds raised in the said writ petition, a copy of which has been enclosed with this petition.

10. The challenge of the appellant in the writ petition against the order of the Designated Judge is based on the following facts:

(i) The contract between the parties was executed before the Act came into force, hence, the Act does not apply.

(ii) Dispute is a stale one having arisen nearly 20 years ago.

(iii) Clause 23 of the agreement contemplates the adjudication of a dispute by a company arbitrator.

(iv) No person other than an arbitrator nominated in clause 23 of the agreement has any jurisdiction to entertain the disputes.

11. All these grounds of attack, in our opinion, can very well be raised before arbitrator appointed by the Designated judge, hence, on the facts, of the case, we find that the writ petition of the appellant was liable to be dismissed by the High Court. For this reason, we do not think it appropriate to remand the matter back to the High Court. Therefore, we dismiss this appeal permitting the appellant to raise all its contentions before the arbitrator appointed by the

Designated Judge."
(Emphasis supplied)

From the aforesaid judgment, it is clear that even in existence of a contract between the parties and even in existence of the named arbitrator, in clause 23 of the agreement between the aforesaid two parties, if the learned Designate of the Chief Justice is appointing another arbitrator, all the four pleas which are referred to hereinabove in para-10 can be raised before the arbitrator, so appointed by the learned Designate of the Chief Justice. Thus, in the present case also, there is an agreement. There is a named arbitrator. But looking to the facts and circumstances of the case, the learned Designate of the Chief Justice in the present case has appointed Shri S.D.Dave, a Retired Judge of this Court, as an arbitrator vide order dated 28th April, 2005 in Arbitration petition no. 26 of 2004. The petitioner can raise all the issues and contentions which are raised in the writ petition before the said arbitrator.

(iv) In the present case, there is an allegation of

bias on the Chairman of the GEB, as per the notice issued by the respondent dated 11th May, 2004 (annexure “B” to the memo of the petition). This allegation is answered by the petitioner by stating the fact that the new Chairman has taken charge of the post and therefore, bias attached with the earlier Chairman is vanished. This Court is not accepting this defence firstly because, it requires to be adjudicated upon, secondly because, it is a contentious issue and thirdly because, this issue is capable of being raised before the arbitrator appointed by the learned Designate of the Chief Justice under section 16 of the Act of 1996. This Court is not going into the details whether this issue of bias raised by the respondent is correct or the defence raised by the petitioner is true and correct or not. This Court is also not going to decide whether the present chairperson is bound by the earlier resolution of the board or not. Neither this Court is going to decide whether bias has evaporated or vanished, no sooner did, the new chairman is taking charge of the post. Howsoever better may be the defence of the petitioner and

howsoever justifiable reason there may be, but it is not the function of this Court to adjudicate as to the existence or otherwise of bias of the Chairman of GEB who is the named arbitrator as per clause-7 of the agreement. It has been held by the Hon'ble Supreme Court in the judgment in the case of **State of Orissa and others vs. Gokulananda Jena** reported in **(2003) 6 SCC, 564**, in paragraphs 12, 13 and 14 as under:

> *"12. The ratio of the decision in Mehul Construction proceeds on the basis that at a time when the matter comes before the Chief Justice or his nominee under section 11 it would not be appropriate for them to entertain any contentious issues between the parties and decide the same and that the decision of the Chief Justice or his nominee is merely an administrative order, the nature of the function performed by them being essentially to aid order, the nature of the function performed by them being essentially to aid the constitution, of an Arbitral Tribunal immediately, just by appointing an arbitrator without wasting any time. Even in case of refusal of the request to make an appointment of an arbitrator this Court observed that there is no involvement of any judicial or quasi judicial function and if at all, the remedy could be only to invoke jurisdiction under Article 226 of the Constitution of India seeking for a mandamus to have the reference made to an arbitrator. In the decision reported in Rani Construction dealing with the case of a challenge made to a reference and the nature of the decision taken to make the reference*

to an arbitrator, the Constitution Bench of this Court held while affirming the earlier decision that the order of the Chief Justice or his designate under section 11 nominating an arbitrator is neither an adjudicatory order nor those functionaries could be held to be a Tribunal to make such a decision, the subject matter of an appeal under Article 136 of the Constitution of India. Adverting to section 16 of the 1996 Act, the Constitution Bench also held that questions relating to the improper constitution of an Arbitral Tribunal or its want of jurisdiction or objections with respect to the existence or validity of the arbitration agreement are matters which should be canvassed before the Arbitral Tribunal itself which has been specifically empowered to rule on such issues and on its own jurisdiction, as well. Unfortunately, the High Court in this case seems to have proceeded to adopt an adjudicatory role and returned a verdict recording reasons as to the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an arbitrator. In view of such peculiar situation, it would be futile for the respondents to contend that the SLPs are not maintainable, particularly in view of the fact that any recourse to have the arbitrator appointed or nominated could be forestalled by the detailed judgment and the findings recorded by the High Court in this matter. In the light of the above, the details pointed out on behalf of the ICA regarding the submission as to the provisions of law actually invoked before the High Court, the nature of application or the character of the order passed pales into insignificance. The objections in this regard are consequently rejected.

13. So far as the questions relating to the relevant scope, meaning, purport and the effect of the arbitration clause found in the agreement between parties are concerned and the legality or propriety of the

constitution of an Arbitral Tribunal, in the teeth of Rules 21 and 22 of the ICA Rules as well as the question relating to alleged contradictions or inconsistencies among those provisions are matters which go to the jurisdiction of the Arbitral Tribunal or as to the existence or validity of the arbitration agreement itself which, as enjoined under section 16 of the 1996 Act, falls within the jurisdiction of the Arbitral Tribunal constituted, which has been enabled to adjudicate on such questions also before embarking upon an exercise to decide the dispute between the parties or decide them simultaneously. This is the inescapable position which inevitably flows not only from the statutory provisions contained in section 16 of the 1996 Act, but that such position came to be firmly settled by more than one decision of this Court, including the one rendered by the Constitution Bench, noticed above. Though elaborate and extensive arguments have been urged on both sides to justify their respective stands or to justify the orders of the ICA the High Court in these cases, we refrain from expressing any opinion on the same out of deference to the consistent view of this Court that such decisions have to be made or taken only by the Arbitral Tribunal itself to which the reference had been made and avoid committing the very same mistake committed by the High Court.

14. The fact that there is an agreement between parties to have their disputes resolved by reference to an arbitration and that it should be through the ICA and in accordance with the rules or procedure prescribed by the ICA is not in controversy. As indicated earlier, even assuming without accepting for purposes of consideration that there is any infirmity in the arbitration clause which goes to undermine as claimed by the respondents the legality, propriety and validity of the constitution of the Tribunal and or even if there be any objections as to the existence of an enforceable or valid

arbitration agreement, it has to be adjudicated by the very Arbitral Tribunal after a reference is made to it on being so constituted and it is not for the ICA or the learned Judge in the High Cort to undertake this impermissible adjudicatory task of adjudging highly contentious issues between the parties. As observed by the Constitution Bench of this Court, there is nothing in section 11 of the 1996 Act that requires the party other than the party making the request to be noticed and that it neither does contemplate a response from the other party nor contemplates any decision by the Chief Justice or his nominee on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the stipulated period. The legislative intent underlying the 1996 Act is to minimise the supervisory role of courts in the arbitral process and nominate/appoint the arbitrator without wasting time, leaving all contentious issues to be urged and agitated before the Arbitral Tribunal itself. Even under the old law, common sense approach alone was commended for being adopted in construing an arbitration clause more to perpetuate the intention of parties to get their disputes resolved through the alternate disputes redressal method of arbitration rather than thwart it by adopting a narrow, pedantic and legalistic interpretation."

Thus, as per para 13 of the aforesaid judgment, any question relating to "relevant, scope, meaning, purport, and the effect of arbitration clause found in the agreement between parties" are the matters which go to the jurisdiction of the arbitral tribunal. Hence, it is clear that the

jurisdiction of the Arbitration Tribunal or dispute as to the existence or validity of the arbitration agreement itself cannot be adjudicated upon by this Court as these disputes are capable of being raised under section 16 of the Act of 1996. This Court, in exercise of powers under Article 226 of the Constitution of India cannot adopt adjudicatory role. Similarly, it has been held by the Hon'ble Supreme Court in the case of **Hythro Power Corporation Ltd. vs. Delhi Transco Ltd. reported in (2003) 8 SCC, 35** in paras 8 and 9 as under:

> *"8. On the facts and background of the dispute briefly indicated above, we find that the designate of the Chief Justice acting administratively under section 11 and the Division Bench of the High Court exercising powers under Article 226 of the Constitution were clearly in error in adjudicating upon the dispute regarding "the validity and existence of the arbitration agreement" and holding that the dispute was not referable to arbitration.*
>
> *9. This Court in three Judge Bench decision and Constitution Bench decision in the case of Konkan Railway (supra) has held that the Chief Justice or his designate under section 11 of the Act exercises purely administrative functions and it is not open to him to discharge any judicial function of adjudicating the dispute even regarding the "existence of arbitration agreement". Whether the letters and exchange of correspondence between the*

parties, pursuant to the NIT, can constitute a contract and an "arbitration agreement" can be read into the same in terms of section 7(4)(b) of the Act was a question solely within the jurisdiction of "Arbitral Tribunal" under section 16 of the Act. See decision in the case of Nimet Resources Inc. vs. Essar Steel Ltd. Wherein Justice Rajendra Babu of this Court acting as designate of the Chief Justice of India while exercising powers under section 11 of the Act, observed thus : (SCC p 500, paras 6-7).

> *"6. I am conscious of the fact that M. Jagannadha Rao, J, in Wellington Associates Ltd. vs. Kirit Mehta held that the jurisdiction of the nominee of the Chief Justice of India to decide the question is not excluded by section 16 of the Act and such a power can be exercised in a suitable case. On this basis, it is no doubt permissible under section 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange of documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, in terms of section 7 of the Act, the appropriate course would be that the arbitrator should decide such a question under section 16 of the Act rather than the Chief Justice of India or his nominee under section 11 of the Act.*
>
> *7. I take this view because the power that is exercised by the nominee of the Chief Justice of India under section 11 of the Act is in the nature of an administrative order. In such a case, unless the Chief Justice of India or this nominee can be absolutely sure that there exists no arbitration agreement between the parties, it would be difficult to state that there should*

be no reference to arbitration. Further, such a view may not be conclusive in view of the nature of the powers that are exercised under section 11(6) of the Act."

The existence, meaning, purport, scope and effect of the arbitration agreement and the validity thereof is also a dispute which can be raised under section 16 of the Act of 1996 and therefore, the said plea ought not to be adjudicated upon in a writ jurisdiction.

(v) It has been held by the Hon'ble Supreme Court in the case of **Konkan Railway Corporation Ltd. and others vs. Mehul Construction Company** reported in **(2000) 7 SCC, 201,** in para-4, the relevant portion of which reads as under:

"4.....The Statement of Objects and Reasons of the Act clearly enunciates that the main objective of the legislation was to minimise the supervisory role of courts in the arbitral process. If a comparison is made between the language of Section 11 of the Act and Article 11 of the Model Law it would be apparent that the Act has designated the Chief Justice of a High Court in cases of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be the authority to perform the function of appointment of arbitrator whereas under the

Model Law the said power has been vested with the court. When the matter is placed before the Chief Justice or his nominee under Section 11 of the Act it is imperative for the said Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the Arbitral Tribunal itself. At that stage it would not be appropriate for the Chief Justice or his nominee to entertain any contentious issues between the parties and decide the same. A bare reading of Sections 13 and 16 of the Act makes it crystal clear that questions with regard to the qualifications, independence and impartiality of the arbitrator and in respect of the jurisdiction of the arbitrator could be raised before the arbitrator who would decide the same.....”

(vi) Similarly, it has been held in the case of **Grid Corporation of Orissa vs. AES Corporation and others** reported in **(2002) 7 SCC, 736** in para-25 as under:

“25. In Konkan Railway Corporation Ltd., it has been held (vide para 21) that in spite of an appointment having been made by the Chief Justice or his designate, an objection as to the constitution of the Arbitral Tribunal being improper or without jurisdiction is capable of being raised before the Arbitral Tribunal itself under section 16 of the Act, for an objection not only as to the width of jurisdiction but also one going to the very root of its jurisdiction is entertain able by the Arbitral Tribunal under section 16. That being so, assuming without holding that

there is any substance in the plea of the petitioners, it is open for them to raise the same before the Arbitral Tribunal. Once the Arbitral Tribunal has come into existence, as it has-in my opinion in the facts and circumstances of the case, a petition under section 11(6) of the Act is not an appropriate remedy which the petitioners have chosen. None of the grounds contemplated by clauses (a)(b) and (c) of sub-section (6) of section 11 exists. There is no deficiency in the constitution of the Arbitral Tribunal attributable to any of the parties or the arbitrators. There is no occasion for filing a request petition under section 11(6) of the Act."

(Emphasis supplied)

Thus, all the contentions which can be raised under section 16 of the Act of 1996 ought not to be adjudicated upon by this Court in a writ jurisdiction under Article 226 of the Constitution of India.

(vii) The learned advocate for the petitioner has vehemently submitted that there is an existence of agreement. Clause-7 thereof is also clearly pointing out the name of the arbitrator and therefore, the learned Designate of the Chief Justice ought to have appointed the named arbitrator. This attractive plea, if looked into closely, it suffers from the vice and therefore, cannot be accepted by this Court. Clause-7

of the agreement reads as under:

> *"7. If any dispute or differences arise between the parties on any matter pertaining to this contract, the issue will be referred to the chairman, GEB, whose decision in the matter shall be final and binding on the parties."*

There is no hard and fast or mathematical rule that the learned Designate Judge of the Chief Justice has no other option, but to appoint the named arbitrator. Several factors must have been weighed with the learned Designate of the Chief Justice. These reasons are not mentioned in the impugned order because the appointment of the arbitrator is not a judicial order, nor is an appeallable order. While appointing an arbitrator, the learned Designate of the Chief Justice has not to decide contentions raised by other side and therefore, without assigning reasons, the arbitrator has to be appointed by the learned Designate of the Chief Justice. There may be several permutations and combinations of the facts of case, contentions in the case and reasons for the appointment of an arbitrator, dehors clause 7 of the agreement. This Court is not deciding anything in

appeal, but suffice it to say that whenever there are allegations of bias against Chairman of GEB, as stated in the notice dated 11th May, 2004, (Anneuxre "B" of the petition), the learned Designate of the Chief Justice has not to decide the question of bias, but learned Designate of the Chief Justice has ample power, jurisdiction and authority, under section 11 of the Act of 1996 to take deviation from the clause of the agreement and to appoint an arbitrator other than who is named in clause-7 of the agreement, without assigning reasons, especially when there are contentious issues (like in the present case, waiver of right of appointment of named arbitrator, bias of named arbitrator, coupled with effect of section 12(4) of the Act, 1996, scope, meaning, purport and the effect of arbitration clause in the agreement and the like). It shall always be presumed that the learned Designate of the Chief Justice is acting accurately under section 11 of the Act of 1996, which empowers the learned Designate of the Chief Justice to secure appointment of an independent and impartial arbitrator. Sub-section (8) of section 11 reads as under:

"11 Appointment of arbitrators :
8. The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-
(a) any qualifications required of the arbitrator by the agreement of the parties
(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

As per the aforesaid sub-section (8), it is expected by the Act of 1996 that whenever an arbitrtor is appointed by the Chief Justice of the learned Designate appointed by him, due regard will be given to secure the appointment of an independent and impartial arbitrator. This Court, in exercise of powers under Article 226 of the Constitution shall always presume that the learned Designate of the Chief Justice has appointed an independent and impartial arbitrator, more so, when there are no allegations by the petitioner against the arbitrator appointed by the learned Designate of the Chief Justice. The learned Designate of the Chief Justice has appointed Shri S.D.Dave, a retired Judge of this Court, as an arbitrtor. The appointment of arbitrator, by the learned Designate of the Chief

Justice must have been made, keeping in mind, combination of facts, contentions and reasons. factors (there is no need for mentioning all these reasons in the impugned order, because it is purely an administrative order and it is not an appealable order.) The dissection of all these factors is uncalled for and unwarranted in exercise of writ jurisdiction under Article 226 of the Constitution of India. The grounds which are available under section 16 of the Act of 1996 ought not to be adjudicated upon in writ jurisdiction, so as to foreclose the arguments of either parties before the arbitrator. The contentions which are raised by the petitioner are capable of being raised before the Arbitrator appointed by the learned Designate of the Chief Justice.

(viii) Frequently, such type of matters are being filed by different petitioners against the orders of the learned Designate of the Chief Justice. Enough guidelines have been given by the Hon'ble Supreme Court so as to minimise litigations. There are several disputes which have been pointed out by the

Hon'ble Supreme Court pertaining to arbitrtor like

I. Qualifications of the Arbitrator;

II. Independence of the Arbitrator

III. Impartiality of the Arbitrator;

IV. Any objections as to the existence of an enforceable Arbitration valid agreement;

V. Legality propriety and validity of the Constitution of the Arbitral Tribunal;

VI. relevant scope, meaning, purport and the effect of the Arbitration clause found in the agreement;

VII. Jurisdiction of the Arbitrator;

VIII. Interpretation of any clause of the agreement especially when the same is based upon highly disputed question of fact which may include “International Commercial Arbitration” clause or;

IX. Other questions similar to the aforesaid disputed questions of fact.

All these disputes should be left for the arbitrator appointed, to adjudicate upon. The High Court should avoid, adjudication of these contentious issues, more particularly in exercise of jurisdiction under Article 226 of the Constitution of India. Thus, all the aforesaid disputes cannot be decided in a writ jurisdiction. All the aforesaid disputes are to be decided by the arbitrator under section 16 of the Act,1996. The aforesaid list of disputes is not an exhaustive list. Still, there can

be more disputes, but the fact remains that whatever disputes which are capable of being decided by the arbitrator ought not to be decided in exercise of powers under Article 226 of the Constitution of India, as far as possible. Looking to the aforesaid trend of the judicial pronouncements and the development of law, the parties to the dispute ought to be relegated to the arbitrator. If the parties are allowed to raise their disputes before this Court in a writ jurisdiction, perhaps, the goal to be achieved by the Act of 1996 may be frustrated. The arbitration proceeding is a proceeding which can easily, speedily and with less costs bring to an end, the disputes between the parties. Arbitrator is a private Judge. Judgment of a private Judge is an award which is binding to parties. Thus, from the aforesaid judicial pronouncements, it is crystal clear that the dispute as to appointment of arbitrator, legality, propriety and validity of the constitution of Arbitration Tribunal etc. ought to be raised before Arbitrator. The facts of the present case, are no exception, to what is already decided by the Hon'ble Apex Court. The existence of the agreement

and the named arbitrator are not such a new fact that it requires intervention by this Court under Article 226 of the Constitution of India. As stated hereinabove, the Hon'ble Supreme Court, in the case of State of Orissa vs. Gokulananda Jena reported in 2003(6) SCC, 465, had not accepted the plea of the party that the agreement contemplates a company arbitrator and no other person than the arbitrator named in clause-23 of the agreement has any jurisdiction to entertain the disputes. Thus, this Court has to walk on a bitten path. The facts of the present case are capable enough, of matching with the facts of the case, already decided by the Hon'ble Supreme Court in the case of State of Orissa(supra) reported in 2003(6) SCC, 465. The learned Designate of the Chief Justice, while passing an administrative and non-appealable order, must have kept in mind, several combinations of facts factors like one, which is already adjudicated upon in the judgment reported in n 2003(6) SCC, 465. Similarly, in the facts of the present case, there is one more highly contentious issue namely, bias of the named arbitrator. There may be a very good answer with the petitioner of non-

existence of bias in a newly appointed Chairman of GEB. Howsoever good may be the answer of the petitioner of the allegation of “bias”, but this Court is not adjudicating upon this highly contentious issue. Suffice it to say that the learned Designate of the Chief Justice, in exercise of the powers under section 11 of the Act has ample jurisdiction, power and authority to appoint another arbitrator, then who is already named in the agreement mainly due to contentious issues involved in the matter. The learned Designate of the Chief Justice has not to give reasons, while appointing an arbitrator under section 11 of the Act and this Court will always presume that as per section 11(8) of the Act of 1996, whenever Chief Justice or the learned Designate of the Chief Justice is appointing an arbitrator, all care will be taken to secure appointment of an independent and impartial arbitrtor. In the instant case, Mr. S.D.Dave, retired Judge of this Court has been appointed as an arbitrtor. Over and above section 11(8) of the Act of 1996, it is also a fact that there are no allegations as to bias or partiality, upon the appointed

arbitrator, by the petitioner. In the present case, after issuance of the notice by the respondent dated 11th May, 2004, there is no appointment of arbitrator despite filing of an application by the respondent under section 11 of the Act of 1996 and hence also, looking to the contentious issues before the learned Designate of the Chief Justice and looking to the formalities completed as per section 11 of the Act of 1996, the learned Designate of the Chief Justice has appointed an arbitrator, which is absolutely true, correct, legal and in consonance with facts and law.

(ix) It is also vehemently submitted by the learned Senior advocate for the petitioner that the respondent could have raised a ground of bias before the named arbitrator as per clause 7 of the Agreement and therefore also, the appointment of the arbitrtor other than the named arbitrtor, by the learned Designate of the Chief Justice, deserves to be quashed and set aside. This argument is not accepted by this Court, for the reason that in view of the provisions of sub-section (4) of section 12 of the Act of 1996, it may not permit the respondent to

raise the ground of challenge as to independence or impartiality of the named arbitrator. In view of the aforesaid position of law, the arbitrtor appointed by the learned Designate of the Chief Justice is true and correct because the petitioner can raise all the averments and allegations before the Arbitrator which are referred to in the memo of the petition. There are several reasons to justify the appointment of an arbitrator appointed by the learned Designate of the Chef Justice, other than who is named in the agreement. This Court is not going into fine nicety of facts. The order passed by the learned Designate need not necessarily, be a reasoned order and therefore, this Court does not think it proper to touch to all probable arguments advanced on behalf of the petitioner. Suffice it to say that in view of the provisions of sub-section (8) of section 11 of the Act of 1996, the learned Designate of the Chief Justice has appointed an independent and impartial arbitrtor in face of contentious issues like, bias and waiver of right of the appointment of arbitrator within 30 days from the date of receipt of notice, coupled with interpretation of sub-section (4) of

section 12 of the Act of 1996.

13. In view of the aforesaid facts and circumstances of the case, reasons, judicial interpretations and and the principles enunciated in the aforesaid judgments of the Hon'ble Supreme Court, I see no reason to interfere with the order dated 28th April, 2005 in Arbitration petition no. 26 of 2004 passed by the learned Designate of the Chief Justice, by which Shri S.D.Dave, a retired Judge of this Court has been appointed as an arbitrator. In the result, the petition fails and is hereby dismissed. Rule is discharged with no order as to costs. Interim relief granted earlier by this Court shall stand vacated.

14. After dictation of this judgment, the learned advocate Ms. L.K.Bhaya for the petitioner requested to stay the implementation and operation of this judgment for a period of two weeks with a view to take recourse to a higher forum. Considering the facts and circumstances of the case, the need of the Act of 1996, and the judicial pronouncements referred hereinabove, I see no reason to accede to the request

made by the learned advocate for the petitioner. Hence, the request is refused.

(D.N.Patel,J)

vii.***darji